



September 7, 2001

Mr. Hal George  
The Kleberg Law Firm  
800 North Shoreline Boulevard, Suite 900  
Corpus Christi, Texas 78401-3709

OR2001-3997

Dear Mr. George:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151686.

The City of Portland (the "city"), which you represent, received a request for the employment application and various other related records pertaining to a specified city police officer. You claim that the submitted information is excepted from disclosure pursuant to sections 552.024, 552.102, 552.103, 552.108, 552.111, and 552.117 of the Government Code. However, since you do not state the reasons why sections 552.108 and 552.111 of the Government Code are applicable, we do not address your claims regarding these exceptions to disclosure. *See* Gov't Code § 552.301(e)(1)(A) (stating that governmental body that requests attorney general decision must submit written comments stating reasons why stated exceptions apply that would allow information to be withheld). We have, however, considered the remaining exceptions that you claim and have reviewed the submitted information.

You claim that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a),(c). The city maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See* Gov't Code § 552.103(c). You speculate that the purpose of the request is to embarrass the officer or to otherwise discredit him or his testimony in a civil or criminal legal proceeding. You also state that the requestor is using the Public Information Act to make an "end run" around discovery rules. You have not indicated, however, that the officer is currently involved in any litigation as a consequence of his employment or that the city reasonably anticipates such litigation. Therefore, we conclude that you may not withhold any information from disclosure pursuant to section 552.103 of the Government Code.

You claim that the submitted information is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will address your section 552.102 claim under section 552.101 in conjunction with the common law right to privacy.<sup>1</sup>

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by the common law right to privacy.

Information is protected by common law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. *See* Open Records Decision No. 545 (1990). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common law right to privacy. *See* Open Records Decision No. 600 (1992). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). For example, this office has held that an employee's participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common law privacy. *See id.*; *see also* Open Records Decision No. 480 (1987). After careful review, we have marked the personal financial information that must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.

We note that the information also contains a document that is subject to section 552.101 in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 552.101 also encompasses information protected by other statutes. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). We have marked the document that is a confidential medical record that may only be disclosed in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990). Therefore, absent the applicability of an MPA access provision, you must withhold the marked medical record from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA.

We also note that the information includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of this document in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the marked Form I-9 is confidential under

section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You also claim that some of the information is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In Open Records Decision No. 670 (2001), we determined that a governmental body could withhold a peace officer's section 552.117(2) information from disclosure without the necessity of requesting a decision from our office regarding such information. *See* Open Records Decision No. 670 (2001). Therefore, a governmental body may black this type of information out when requesting an attorney general decision regarding other requested information. However, we note that you have completely obliterated information that is clearly not protected under section 552.117(2).<sup>2</sup> This information pertains to the officer's date of birth, work and business phone numbers, and employee and other identification numbers. This information must be released to the requestor. Furthermore, we have marked additional information that must also be withheld from disclosure pursuant to section 552.117(2) of the Government Code.

We also note that the information contains motor vehicle information that is subject to section 552.130 of the Government Code. Section 552.130 excepts information from disclosure that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. We have marked the officer's driver's license number and a license plate number of a third party that must be withheld from disclosure pursuant to section 552.130. However, we note that the information also contains information pertaining to the officer's "Op. License #." If the "Op. License #" is a Texas driver's license number, then you must also withhold that number from disclosure pursuant to section 552.130 of the Government Code.

In summary, you must withhold the marked personal financial information from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy. Absent the applicability of an MPA access provision, you must withhold the marked medical record from disclosure pursuant to section 552.101 in conjunction with the MPA. You must withhold the I-9 form from disclosure, since it is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. You must release information relating to the officer's date of birth, work and business phone numbers, and employee and

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<sup>2</sup> In the future, failure to comply completely with section 552.301 will result in a decision that the requested information is public and must be released in its entirety. *See* Gov't Code §§ 552.006, .301(e), .302.

other identification numbers. You must withhold from disclosure the additional information that we have marked as excepted under section 552.117(2). You must withhold from disclosure the officer's driver's license number and the license plate number of a third party pursuant to section 552.130 of the Government Code. You must withhold from disclosure the officer's "Op. License #," if the "Op. License #" is a Texas driver's license number. You must release all other submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Ronald J. Bounds". The signature is written in a cursive style with a large, stylized "R" and "B".

Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 151686

Enc. Marked documents

cc: Mr. Michael P. O'Brien  
Michael P. O'Brien, P.C.  
P.O. Box 6791  
Corpus Christi, Texas 78411  
(w/o enclosures)